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In The

Supreme Court of the United States

October Term, 1994

JOHN J. HURLEY, Individually, and the
SOUTH BOSTON ALLIED WAR VETERANS COUNCIL,

Petitioners,

v.

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, An Unincorporated Association By and Through TIMOTHY DALEY, BARBARA KAY and CATHLEEN FINN, Acting On Their Own Behalf and On Behalf of Members of the Association,

Respondents.

On Writ of Certiorari to the
Supreme Judicial Court of Massachusetts

BRIEF OF IRISH LESBIAN AND GAY ORGANIZATION AND CENTER FOR CONSTITUTIONAL RIGHTS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the even-handed application of a content-neutral anti-discrimination statute violates the First Amendment as applied to the private organizer of a civic celebration of a public holiday?

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INTEREST OF THE *AMICI*

The Irish Lesbian and Gay Organization ("ILGO") is an organization of Irish and Irish-American lesbians and gay men formed in 1990 to create a safe and comfortable environment for its members to meet and to address their social, cultural and political needs. ILGO has for the past four years sought to participate in a city-wide celebration of St. Patrick's Day through participation in the St. Patrick's Day Parade held in New York City (the "New York Parade"). Like the Respondent Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB"), ILGO has been refused the opportunity to participate by the New York Parade's organizers because of the identified sexual orientation of ILGO's members.[1] In the various legal proceedings related to ILGO's unsuccessful efforts to participate in the New York Parade, the New York

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[1] In one of the many fora in which the New York Parade was litigated, the New York Parade was adjudicated to be a public accommodation within the meaning of New York City's Human Rights Law. *See New York City Comm'n on Human Rights v. Ancient Order of Hibernians in America*, No. MPA-0362, slip op. at 2-3 (N.Y. City Comm'n on Human Rights Oct. 27, 1992), *appeal dismissed as moot sub nom. Beirne v. New York City Comm'n on Human Rights*, No. 29840/92 (N.Y. Sup. Ct. New York County Mar. 3, 1993) (attached as Appendix A). Similar to the Massachusetts public accommodations law at issue in this proceeding, New York City's Human Rights Law states that

> [i]t shall be an unlawful discriminatory practice for any person, being the . . . agent or employee of any place of public accommodation, . . . because of the [sexual orientation] of any person directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities, or privileges thereof, or, directly or indirectly, to publish, circulate, issue, display, post, or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of [sexual orientation].

NEW YORK, N.Y., ADMIN. CODE §§ 8-107(2), -108 (1992).

Parade organizers have consistently asserted that their First Amendment rights of free speech and expressive association override New York City's interest in prohibiting discrimination based upon sexual orientation.[2] In response, for the past three years ILGO has attempted to stage a peaceful march prior to the New York Parade to protest its exclusion from the parade. Each attempt has resulted in the arrest of dozens of ILGO members and supporters.

ILGO has a keen interest in the outcome of this case. The propriety of applying Massachusetts' anti-discrimination law to Boston's St. Patrick's Day/Evacuation Day Parade (the "Parade") bears directly on the future application of New York City's Human Rights Law to the New York Parade, and this Court's decision will affect ILGO's right to participate in the New York Parade.

The Center for Constitutional Rights ("CCR") is a non-profit legal and educational organization dedicated to protecting and advancing the rights guaranteed by the Constitution of the United States and the Universal Declaration of Human Rights. Born in 1966 out of the civil rights struggles of people of African descent in the South, CCR, through litigation and education, has worked to make meaningful the international, constitutional, as well as statutory, rights of Blacks, Latinos, Native Americans, Asians, women, lesbians, gay males and other groups that have been historically subjected to discrimination.

Over the years, CCR has been involved in numerous cases involving violence and discrimination against or harassment of lesbians and gay males. The issues involved in this action are of paramount importance to CCR because of its above

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[2] In a related case regarding New York City's refusal to issue a permit to conduct the New York Parade, the United States District Court for the Southern District of New York agreed and determined that application of the city's Human Rights Law to the New York Parade violated the organizer's First Amendment rights. *See New York County Board of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358 (S.D.N.Y. 1993) (Duffy, J.). As a technical matter, the decision of the City Commission on Human Rights was not before Judge Duffy, but his decision was determined to have mooted the appeal of the Commission's decision.

described mission, since their resolution will have a tremendous impact on the rights of lesbians and gay people, as well as other protected classes, under anti-discrimination laws throughout the United States.

Accordingly, ILGO and CCR respectfully provide this Court with the following legal considerations relevant to the resolution of this and similar controversies. All parties have consented to the filing of this brief.

STATEMENT OF THE CASE

The pertinent facts are fully set forth in the opinion of the Massachusetts trial court, as affirmed by the Massachusetts Supreme Judicial Court, and are summarized in Respondents' statement of the case.

SUMMARY OF ARGUMENT

Amici assert that when a court's detailed analysis of the facts and circumstances surrounding a given parade reveals that the parade constitutes a civic celebration of a public holiday, is not a "protest" or the expression of a "particularized message" and otherwise possesses no other characteristics that would entitle it to exemption from state anti-discrimination laws, the parade is not the type of speech or association protected by the First Amendment and the organizers must comply with the state's anti-discrimination laws. Alternatively, even if the organizers' First Amendment rights are implicated, some limited infringement on those rights is justified in order to serve "compelling state interests unrelated to the suppression of ideas that cannot be advanced through means significantly less restrictive of associational freedoms," such as regulations aimed at the eradication of discrimination based on sexual orientation.

The notoriety, rhetoric and high emotions surrounding this case may make it appear more complicated than it really is. *Amici* believe that this case presents no different issues than those presented in all cases in which the protections and

privileges guaranteed by the First Amendment are sought; the facts and circumstances of the activity or event at issue must be examined before a determination can be made as to whether the activity or event at issue is entitled to those protections and privileges. Petitioners John J. Hurley and the South Boston Allied War Veterans Council ("Petitioners"), on the other hand, invite this Court to make entirely new law by holding that all events called parades are *per se* entitled to absolute First Amendment protection.

For this Court to do what Petitioners urge—to "state in clear terms that parades, like books and protest marches, are a form of speech *per se*, deserving of First Amendment protection from *any* abridgment, intrusion or content-based evaluation by the state, subject to the normal exceptions such as obscenity," Brief for Petitioners at 9 (emphasis added) — would result in the granting of extraordinary privileges — exemption from state laws — to an event or activity *solely* on the basis of its ambulatory nature. Furthermore, in acceding to Petitioners' request, this Court would be granting general absolution for *any* wrongs that the organizers of *any* parade may wish to commit, regardless of whether absolution is deserved or sanctioned in favor of the greater good or obtained merely by trickery. Petitioners and organizers of other civic holiday parades would then be free to exclude at their whim from future parades any ethnic or racial minority, or any other individual or group, they choose.

For this Court to accept Petitioners' arguments would be to transform the wrongdoers (the discriminators) into the victims, and the victims (GLIB) into the wrongdoers and, in so doing, to violate the principles articulated by this Court some twenty years ago; "Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been afforded affirmative constitutional protections." *Norwood v. Harrison*, 413 U.S. 455, 470 (1973).

Amici want to make very clear that they, like the Massachusetts Supreme Judicial Court, believe that all parades are not alike. In events involving the expressions of protests,

grievances against the government or particularized messages, or possessing other characteristics that upon examination entitle the organizers thereof to First Amendment protections, *Amici* would support the application of full First Amendment protections to the organizers of such an event. *Amici* acknowledge that most events labelled parades will (and should), in fact, be found to be expressions of speech in the full First Amendment sense of the word and, accordingly, entitled to the full protections and privileges of the First Amendment. In upholding the judgment of the Supreme Judicial Court, this Court would not open the floodgates to a wave of anti-free speech, anti-First Amendment regulation. It would merely be reaffirming the principle that the First Amendment cannot (at least in all circumstances) be used as the last refuge of the scoundrel, and its protections and privileges are not available merely for the asking or through chicanery.

Amici respectfully urge this Court to affirm the judgment of the Massachusetts Supreme Judicial Court. To do otherwise would be to fly in the face of this Court's own jurisprudence on these issues, as well as to ignore the particular facts of this case as found (after a thorough examination of the record and an opportunity to hear testimony) by the Massachusetts courts.

ARGUMENT

I. FIRST AMENDMENT JURISPRUDENCE REQUIRES THAT A COURT EXAMINE THE FACTS TO DETERMINE WHETHER AN ACTIVITY IS EXPRESSIVE SPEECH OR ASSOCIATION ENTITLED TO THE PROTECTIONS OF THE FIRST AMENDMENT

A. *The Nature And Character Of An Event Or Association Must Be Examined By A Court*

When an abridgement of the exercise of rights protected under the First Amendment is claimed, a court must first determine whether the activity, conduct or speech at issue is

within the scope of the amendment's protection. *Texas v. Johnson*, 491 U.S. 397, 403 (1989) ("We must first determine whether [the activity] constitutes expressive conduct."). When conduct, rather than words, is involved, a court must first determine whether there is a communicative element in the conduct, and then, if so, whether it is constitutionally protected communication. *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968); *Spence v. Washington*, 418 U.S. 405, 409 (1974) ("It is . . . necessary to determine whether [the] activity [is] sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[] . . ."). This First Amendment analysis is applied to a wide variety of activities.[3]

On at least three previous occasions, this Court has considered the application of the First Amendment to civil rights marches and demonstrations, and, even for those types of activities, the Court first evaluated whether the protest marches

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[3] *See, e.g., Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) (in the "circumstances of our times," peaceful picketing in front of a business to disseminate information about a labor dispute is within the area of free discussion guaranteed by the Constitution); *Roth v. United States*, 354 U.S. 476, 481-85 (1957) (libelous utterances and obscenity are "utterly without redeeming social importance" and not within the area of constitutionally protected speech); *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (assuming that the burning of a Selective Service registration certificate was communicative conduct sufficient to bring into play the First Amendment); *Spence v. Washington*, 418 U.S. 405, 409-10 (1974) (considering the nature of activity, factual and environmental context, hanging an American flag upside down with a peace sign over it to protest the Vietnam War was a form of protected expression); *United States v. Grace*, 461 U.S. 171, 176 (1983) (distribution of leaflets, pamphlets and handbills and carrying picket signs protesting various political causes were expressive activities); *Texas v. Johnson*, 491 U.S. 397, 405-06 (1989) (flag burning at end of demonstration at Republican National Convention to protest Reagan's policies, in the context in which it occurred, was protected conduct considering the "expressive, political nature of this conduct"); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991) (nude dancing performed for entertainment is expressive conduct "marginally" within the outer perimeters of the First Amendment).

were expressive activities. In *Shuttlesworth v. Birmingham*, 394 U.S. 147, 152 (1969), this Court emphasized that the First Amendment does not "afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as th[at] amendment[] afford[s] to those who communicate ideas by pure speech" (*quoting Cox v. Louisiana*, 379 U.S. 536, 555 (1965)). *See also Edwards v. South Carolina*, 372 U.S. 229, 235-36 (1963) (peaceable assembly at the site of the State Government to express grievances was an exercise of First Amendment rights in "their most pristine and classic form").

The requirement that a court examine activity and circumstances to determine whether constitutional protection is warranted is identical in the face of a claim of infringement of the First Amendment's right of expressive association. This Court has written:

> The cases cited in *Roberts* recognize that "freedom of speech" means more than simply the right to talk and write. It is possible to find some kernel of expression in almost any activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.

Dallas v. Stanglin, 490 U.S. 19, 25 (1989) (teenage patrons of a dance hall although "associational in common parlance" did not involve the sort of expressive association that the First Amendment has been held to protect). Only two types of association are protected by the Constitution: certain "intimate human relationships" and associations "for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). Although the right of

expressive association extends to groups organized to engage in speech that does not pertain directly to politics, purely "social association" is not protected under the First Amendment. *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). Each association claiming First Amendment protection must be examined to determine if it is, in fact, one of the types of association that falls within the scope of constitutional protection.

B. *The Label An Actor Places On An Event Is Not Dispositive For Purposes Of First Amendment Analysis*

There is no rule that all conduct is presumptively expressive. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). Activities are not given *per se* First Amendment protection just because the actor labels the activity as expressive speech or association. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea"); *Dallas v. Stanglin*, 490 U.S. 19, 24 (1989) (rejecting the label of expressive association that the dance hall operator attached to his patrons' activities in the dance hall). To qualify for constitutional protection, this Court has required, among other things, an intent to convey a "particularized message" and that the surrounding circumstances indicate a great likelihood that "the [intended, particularized] message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).[4] Courts have never accepted the label at-

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[4] In other contexts, courts refuse to accept the self-serving label a litigant places upon its activity, when the characterization of the activity is crucial to the application of the law and accepting a party's label would defeat the purpose of the law. *See, e.g., Field v. Trump*, 850 F.2d 938, 944 (2d Cir. 1988) (in securities law whether acquisition of shares is part of a tender offer for purposes of the Williams Act cannot be determined by "rubberstamping" the label used by the acquiror), *cert. denied*, 489 U.S. 1012 (1989).

tached by the actor seeking constitutional protection without conducting an independent First Amendment analysis. In fact, no case has been located where a court gave the label affixed to the activity by the actor much consideration at all. If the activity seeking First Amendment protection has a significant historical record, there is even less necessity to consider the actor's self-serving characterization of such activity for the purposes of a First Amendment analysis.

C. *The Massachusetts Courts Properly Examined The Facts, Nature And Characteristics Of The Parade And Concluded That It Was Not Speech Warranting First Amendment Protection*

Petitioners may now wish that they had, over the years, organized and presented a First Amendment activity, but the conclusion of the Massachusetts courts is that they had not. The Massachusetts courts made a careful analysis of the history, circumstances and characteristics of the Parade, rather than jumping to a constitutional conclusion based on its label, and concluded on the basis of such careful analysis that the Parade has assumed the character of a public, secular, celebratory civic event, subject to the general laws of the Commonwealth of Massachusetts, G.L. c.272, §§ 92A & 98 (the "anti-discrimination" or "public accommodations law") (Pet. for Cert. at B5-B9; C6-C12; C14-C15.[5]

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[5] For example, the trial court considered the lack of selectivity exerted by Petitioners over the Parade's participants and sponsors, as well as the Parade's historical roots (Pet. for Cert. at C6). Judge Flannery considered the size of the Parade, the number of spectators, and its status as "the largest New England event for Irish-Americans, their friends and well-wishers" (*Id.* at C7). He also noted that the interests and the viewpoints represented were truly universal, including commercial, religious, political, patriotic, athletic and public service. (*Id.*)

The Supreme Judicial Court's judgment carries none of the dreadful implications for freedom of association or expression that Petitioners and their supporters claim; rather, as the Supreme Judicial Court said, it involves only this particular event (*Id.* at C13 n.18). Surely there is nothing unusual or threatening about making an inquiry to determine the characteristics of an event in order to determine its constitutional status.

Here, Petitioners, in order to wrap a constitutional mantle around their illegal discrimination, assert they are entitled to put on a parade which is expressive and exclusionary. No one contests that they have such a right *if* they put on such a parade. What Judge Flannery and the Supreme Judicial Court concluded, however, based on a substantial record, was that this was not such an event; that the Parade was something else entirely, one that did not implicate any First Amendment rights and, accordingly, one that should be subject to the anti-discrimination laws of Massachusetts.

D. *The Organizer Of A Civic Celebration Of A Public Holiday Should Not Be Exempt From State Anti-Discrimination Laws Under The First Amendment*

This Court has never decided (and should not) that civic celebrations of public holidays, such as St. Patrick's Day parades, Fourth of July parades or Thanksgiving Day parades, constitute the kind of expressive speech, conduct or association for purposes of First Amendment protection that enables a civic parade's private organizer to discriminate against potential parade participants and, in so doing, violate anti-discrimination laws. Petitioners' invitation to this Court to create a broad pronouncement that all parades are *per se* expressive speech subject to First Amendment protection should be flatly rejected. Just because Petitioners need a *per se* rule in order to prevail here, that is not a reason for this Court to alter its well-settled constitutional jurisprudence and legal principles.

Amici assert that when a court's detailed analysis of the facts and circumstances surrounding a given parade reveals that the parade constitutes a civic celebration of a public holiday, is not a "protest" or the expression of a "particularized message" and otherwise possesses no other characteristics that would entitle it to exemption from state anti-discrimination laws, the parade is not the type of speech or association protected by the First Amendment and the organizers must comply with the state's anti-discrimination laws. Alternatively, even if the organizers' First Amendment rights are implicated, some limited infringement of those rights is justified in order to serve "compelling state interests unrelated to the suppression of ideas that cannot be advanced through means significantly less restrictive of associational freedoms," such as regulations aimed at the eradication of discrimination based on sexual orientation. *Cf. Spence v. Washington*, 418 U.S. 405, 410-11 (1974); *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984).

II. EVEN IF A COURT CONCLUDES THAT AN ACTIVITY IS EXPRESSIVE SPEECH OR ASSOCIATION, THE ACTIVITY IS NONETHELESS SUBJECT TO REGULATION

As this Court has stated in the past:

> The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order . . . .

Shuttlesworth v. Birmingham, 394 U.S. 147, 152 (1969).

Even if an activity is determined to be the type of activity that warrants First Amendment protection, this Court has established a four-part test to determine if federal or state government regulation of the activity is justified. The regulation is justified if: (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction of the alleged First Amendment freedoms is no greater than is essential to further the governmental interest. *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). The freedom to associate with others is also not absolute. "Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623; *see also New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988).

Amici refer the Court to Respondents' brief for a full discussion of the application of the facts in this case to this Court's four-part test to determine if government regulation is justified.

A. *In Enacting Anti-Discrimination Laws The Legislature Has Balanced The Competing Interests Of Eliminating Discrimination And Constitutional Protections And This Court May Give Consideration To The Legislature's Balancing*

Amici respectfully suggest that when balancing the competing interests of a state's regulation of discrimination and the rights afforded by the First Amendment, it is appropriate to give consideration to the state legislature's balancing of these interests. *See Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 563 (1990) (deference given to the National legislature); *Madsen v. Women's Health Center, Inc.*, __ U.S. __, 114 S.Ct. 2516, 2524 (1994) ("Ordinances represent a legislative choice regarding the promotion of particular societal inter-

ests."). *Cf. Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

The Commonwealth of Massachusetts has enacted legislation designed to serve its compelling state interest in eradicating discrimination in places of public accommodation. Contrary to Petitioners' assertions, application of this legislation to the Parade satisfies the standards enunciated by this Court and any limited infringement on Petitioners' right to expressive association effected by requiring them to allow GLIB to march in the Parade is outweighed by essential, countervailing state interests and is thus constitutionally permissible.

Roberts is directly on point:

> The state court's articulated willingness to adopt limiting constructions that would exclude private groups from the state's reach, together with the commonly used and sufficiently precise standards it employed to determine that the Jaycees is not such a group, establish that the Act, as currently construed, does not create an unacceptable risk of application to a substantial amount of protected conduct.

Roberts, 468 U.S. at 630-31.

In *Roberts*, this Court rejected the claim of the Jaycees, a nonprofit organization dedicated to "the growth and development of young men's civic organizations," *id.* at 612, that their freedom of expressive association was unconstitutionally infringed by the requirement that they admit women as full voting members.[6] This Court held that Minnesota's compelling interest in eradicating discrimination through its Human

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[6] Women had previously been permitted to participate in various Jaycees activities, but were accorded only secondary membership status, which denied them certain voting and other privileges. *Roberts*, 468 U.S. at 613-14.

Rights Law outweighed any minimal intrusion on the organization's ability to engage in activities protected by the First Amendment or "to disseminate its preferred views." *Id.* at 627.

Massachusetts' public accommodations law, like Minnesota's and other similar codes adopted around the country, "reflects the [Commonwealth's] strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services." *See id.; Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987). In 1989, reflecting its particular concern with eradicating sexual orientation discrimination, the Massachusetts legislature amended the public accommodations law specifically to reach such discrimination. *Cf. Gay Rights Coalition of Georgetown Univ. v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987) ("*Gay Rights Coalition*") (finding that District of Columbia had compelling interest in eradicating sexual orientation discrimination).

It is clear that a legislature has the power to balance the public interest in equal opportunity against the First Amendment rights of other groups or individuals. *See Roberts*, 468 U.S. 609; *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619 (1986). In *New York State Club Ass'n v. City of New York*, 69 N.Y.2d 211, 223, 505 N.E.2d 915, 513 N.Y.S.2d 349 (1987), *aff'd*, 487 U.S. 1 (1988), for example, the New York Court of Appeals upheld, and this Court affirmed, the right of the City Council to balance competing constitutional rights, specifically finding that "compelling governmental interest, unrelated to the suppression of ideas—here the City's strong public policy to eliminate discrimination against women and minorities—manifestly justifies some infringement" against the rights of another group. To reexamine the balance between Petitioners' First Amendment rights and the Commonwealth's compelling interest in eliminating discrimination based on sexual orientation *after* finding that the Parade is a public accommodation and that the provisions of the General Laws have been breached would be to "engage in a legislative-like *ab initio* assessment of the asserted gov-

ernmental interest, [and to risk] ignoring [a] court's more traditional judicial task of comparing like cases to determine the appropriate outcome of the instant one." *Gay Rights Coalition*, 536 A.2d at 43. Here, the Massachusetts legislature, in enacting the public accommodations law, has already made its determination of where the interests lie in balancing its goal of eliminating discrimination against a discriminator's First Amendment rights to discriminate.[7]

Nor is the purpose of applying the public accommodations law to this Parade to hamper Petitioners' speech or any other speech. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (government regulation of expressive activity is

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[7] Moreover, the public accommodations law does not "require one private actor to 'endorse' the ideas or conduct of another." *See Gay Rights Coalition*, 536 A.2d at 17. To hold that ordering Petitioners to allow GLIB to participate is to compel the Petitioners to *endorse* homosexuality is to "defeat the plain language of the statute and simultaneously transform the [public accommodations law] into a patent invasion of the first amendment." *Id.* Petitioners are not being compelled to endorse homosexuality; they are merely being prevented from discriminating on any of the bases set forth in the public accommodations law. "[T]he Law merely prevents [the organizers] from using race, sex, and the other specified characteristics as shorthand measures in place of what the city considers to be more legitimate criteria for determining membership." *New York State Club Ass'n v. New York City*, 487 U.S. 1, 13 (1988). In this regard, the *amicus* ACLU's reliance on *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281 (D. Md. 1988), is misplaced. The KKK parade in that case was not a "public accommodation" because, among other things, it was limited to card carrying members of the KKK. Accordingly, no statutory prohibition on discrimination was implicated, permitting a first-time balancing of conflicting constitutional rights of expressive association of the KKK superseding the First Amendment right of free speech of any other organization desiring to participate in that parade. The ACLU, in effect, mixes apples and oranges by analogizing the Parade, a public accommodation, to the KKK parade, an event which, under the criteria laid down in, among other cases, *Concord Rod & Gun Club, Inc. v. Massachusetts Commission Against Discrimination*, 402 Mass. 716, 524 N.E.2d 1364 (1988) and *Local Fin. Co. v. Massachusetts Comm'n Against Discrimination*, 355 Mass. 10, 242 N.E.2d 536 (1968), would never be found to be a "public accommodation" within the meaning of the public accommodations law.

content-neutral so long as it is justified without reference to content of regulated speech). Obviously, the public accommodations law was neither targeted at the Parade nor enacted to prevent the Parade from taking place. *Cf. Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281, 288 (D. Md. 1988) (evidence demonstrated nondiscrimination ordinance "was created only for the KKK with probable knowledge that the KKK would not parade at all if forced to do so with black participants").

This Court has held that the enforcement of a public accommodations law of general applicability, even if it causes "some incidental abridgment of . . . protected speech," has an effect "no greater than is necessary to accomplish the [government's] legitimate purposes." *Roberts*, 468 U.S. at 628; *cf. Ward*, 491 U.S. at 789 (alternative need not be the least restrictive one to be constitutional).[8] As with the Minnesota statute at issue in *Roberts*, the Supreme Judicial Court's application of the Commonwealth's public accommodations law to the Parade "responds precisely to the substantive problem that legitimately concerns" the Commonwealth—namely, eradicating an "act[ ] of invidious discrimination in the distribution of publicly available . . . advantages"—"and abridges no more speech or associational freedom than is necessary to accomplish that purpose." *Roberts*, 468 U.S. at

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[8] A suggestion of offering the excluded group an alternative opportunity to march as being a less restrictive means of achieving the state's compelling interest in eliminating discrimination misses the point. The Commonwealth's goal in enacting the anti-discrimination provisions of the General Laws was to eliminate discrimination, not to provide those who fall within a protected category with an alternative discrimination-free forum. *See North Shore Right to Life Comm. v. Manhasset Am. Legion*, 452 F. Supp. 834, 840 (E.D.N.Y. 1978) (court rejected the argument that anti-abortion group should hold its own separate parade after the main parade, noting that such a parade would "relegate them to an 'undignified position, behind the sweepers'"); *Irish Subcommittee v. Rhode Island Heritage Comm'n*, 646 F. Supp. 347, 358 (D.R.I. 1986) ("The availability of alternative forums for expressive activity will not, however, cure an otherwise defective content-based regulation").

628-29 (citing *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984)).

B. *A Parade For The Civic Celebration Of A Public Holiday Is A Scarce Public Resource Subject To Regulations And Restrictions And Must Be Operated In The Public Interest*

Prior to the 1995 Parade, the Parade was a civic celebration of a public holiday. It was one of the six largest parades held in Boston annually, and the largest New England event for Irish-Americans, their friends and well-wishers (Pet. for Cert. at B9). The 400,000 to 750,000 spectators and participants in the annual Boston St. Patrick/Evacuation Day Parade heard and spoke the one message that this Parade conveyed — "It's St. Patrick's Day — everybody's Irish on St. Patrick's Day — let's party together!!" *See* Pet. for Cert.at B27 ("an open recreational event"), C7 ("providing entertainment, amusement and recreation to participants and spectators alike") & C15 ("no error . . . in finding that the parade was not used by [Petitioners] for expressive purposes"). As the Massachusetts courts found, this is not a march for civil rights sponsored by the NAACP, or for white supremacist rights sponsored by the KKK, or for any of the myriad of rights promoted by focused, specialized private organizations that use the public streets to conduct protest marches for political and social causes. *Id.* When one considers the type of parade at issue, the major celebration of St. Patrick's Day in New England, this Court's broadcasting cases, by analogy, are relevant.

There is a finite, limited number of public holiday celebrations, just as there is a finite, limited number of broadcast frequencies. Both media are directed at millions of people. Consequently, parades celebrating public holidays "constitute[] a scarce resource whose use could be regulated and rationalized only by the Government." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376 (1969). *See also Turner Broadcasting System, Inc. v. F.C.C.*, __ U.S. __, 114 S.Ct. 2445, 2457 (1994) (recognizing the continuing validity of broadcast jurisprudence where "the inherent physical limita-

tion on the number of speakers who may use the broadcast medium . . . require[s] some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees").[9]

Congress has mandated that the FCC consider the demands of the public interest in the course of granting broadcasting licenses. *Red Lion*, 395 U.S. at 379. This Court has interpreted that mandate as a responsibility to assure that broadcasters operate in the public interest. *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943). "[B]roadcast frequencies are limited and, therefore, they have been necessarily considered a public trust. Every licensee who is fortunate in obtaining a license is mandated to operate in the public interest and has assumed the obligation of presenting important public questions fairly and without bias." *Red Lion*, 395 U.S. at 383 (quoting from the legislative history of an amendment to the Communications Act of 1934). Similarly, parades that are broad-based events monopolizing a locality's celebration of a particular holiday—whether it be July 4th, Thanksgiving, St. Patrick's Day or other similar days—should be viewed as a scarce public resource subject to some regulation. Parades celebrating public holidays, like the public airwaves, are a public trust; those fortunate enough to obtain the permit to organize holiday parades have obligations and responsibili

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[9] The analogy is further strengthened by the fact that local governments issue parade permits just as the federal government issues broadcasting licenses. Congress recognized that the failure to limit and regulate the airwaves resulted in chaos and a medium that would be of little use to anyone "because of the cacophony [sic] of competing voices, none of which could be clearly and predictably heard." *Red Lion, 395 U.S.* at 376-388. The practicalities and public safety concerns associated with the organization and conduct of parades warrant the view that local governments should limit and regulate parades, so long as the scheme controlling the time, place and manner of the parade is not based on the content of the parade's message and does not give a government official broad discretion that would allow arbitrary application of the regulations. *Cox v. New Hampshire*, 312 U.S. 569, 574-76 (1941); *Forsyth County, GA. v. Nationalist Movement*, __ U.S. __, 112 S.Ct. 2395, 2401 (1992).

ties to the public, like those of a broadcaster. This is not to suggest that the Parade be turned into a forum for debate on public issues like that required for public broadcasters. It is, however, in the public interest to require the holders of permits for this type of public celebration to obey anti-discrimination laws, even if it should result in a limited restraint on their First Amendment rights.[10]

The limitations on the number of frequencies for public broadcasting and the number of parades to be held on public holidays means that only a tiny fraction of those who desire to broadcast or organize a parade on a holiday will be permitted to do so. The rest, by necessity, are barred from the airways and the parade route. *Red Lion*, 395 U.S. at 388-89. This Court has held that no one has a First Amendment right to a broadcast license or to monopolize a radio frequency, and the denial of a station license when the public interest required it "is not a denial of free speech." *National Broadcasting*, 319 U.S. at 227.

Broadcasters have challenged the fairness doctrine requiring that each side of public issues be given fair coverage and related FCC rules that place restrictions on a broadcaster's First Amendment rights in an identical manner to the Petitioners' challenge here. They argued that it was "their" radio station, and "their" license, and "the First Amendment pro-

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[10] The law developed for issuing parade permits offers guidance for the development of the law for permit holders of parades celebrating public holidays. A municipality may not empower its parade licensing officials to dispense or withhold parade permits "according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency,' or 'morals' of the community," yet Petitioners suggest that a municipality should empower the private organizer of a parade celebrating a public holiday to exclude parade participants protected by anti-discrimination laws, based on their own opinions of that participants' potential effect on the "welfare," "decency," or "morals" of the community. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 152 (1969). *Amici* suggest that the same considerations underlying the restrictions on government officials issuing parade permits are relevant to parade permit holders for parades that are a city's celebration of a public holiday. *Cf. Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

tects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency." *Red Lion*, 395 U.S. at 386. Broadcasters argued that the benefits of the First Amendment to say or publish whatever they think and to refuse to give equal weight to the views of those with whom they disagree, or simply don't like, should be equally available to broadcasters as they are to any other citizen. *Red Lion*, 395 U.S. at 386. For the same reasons that this Court has rejected the arguments of the broadcasters and denied them the use of the First Amendment to protect their monopolies over speech on the Nation's airways, this Court should reject Petitioners' arguments here and their attempt to use the First Amendment's protections to monopolize all speech in a city's celebration of a public holiday and to violate Massachusetts' anti-discrimination laws by their exclusion of identified lesbians, gay men and bisexuals from participation in a public holiday celebration.[11]

Other important First Amendment principles developed in broadcasting law are equally applicable here. "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion*, 395 U.S. at 390. The citizens of Boston were attending a party to celebrate a holiday when they were attending the Parade for all of those years. Those citizens may very well welcome all people to attend and participate in the party and have no desire to exclude anyone from it. After all, those same citizens elected the legislators who enacted the anti-discrimination laws. The Parade may be properly characterized as "belonging" to the 750,000 citizens

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[11] By the same logic that Petitioners argue that they may legally exclud lesbians, gay men and bisexuals from "their Parade," Petitioners should b free in the future to exclude other groups of citizens at their whim. Th only limits on Petitioners' future exclusions may be their view of who they could "get away with excluding." Just as this Court would neve sanction excluding the participation of African-Americans from the Macy Thanksgiving Day Parade in New York under the ruse that this ethnic grou was not present at Plymouth, exclusion of GLIB from the Parade shou similarly not be sanctioned.

of Boston who attend each year and not the permit holder at all. There is no justification for the permit holder of this Parade to be allowed to exclusively, and without any adherence to the anti-discrimination laws, dictate to the viewers and listeners what they will be permitted to see and hear on St. Patrick's Day.

The broadcasting analogy is also useful in considering the effectiveness of an action, such as the one here, against the organizers of parades like the Parade or the New York Parade. Because it is virtually undisputed that certain parades will be entitled to First Amendment protections—including the right to exclude from the line of march those with views antithetical to the parade's organizers—the first response of the organizers of a parade found to be without First Amendment privileges will be to formulate an expressive message for the event. In formulating and disseminating this "new" message, they seek to transform their previously celebratory civic event into an event that is a vehicle for expression of their (alleged) deeply held beliefs. The Ancient Order of Hibernians (the organizers of the New York Parade) and Petitioners have each done this and each has been thus far successful. *See New York County Board of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358 (S.D.N.Y. 1993); *South Boston Allied War Veterans Council v. City of Boston*, C.A. No. 94-11402-MLW (D. Mass. Jan. 17, 1995). The ability of the parade organizers to redefine their message makes a plaintiff's attempt to obtain relief, and a court's ability to grant relief, illusory. While this may be the correct result in certain instances, it is not the correct result, we respectfully suggest, in circumstances where the organizer has a virtual monopoly on the celebration of a public holiday. In those circumstances, rather than allowing the organizers to retain their monopoly of the celebration, at the very least, consideration should be given to granting that monopoly to those willing to be inclusive. In addition, the sort of redefining that Petitioners and the Ancient Order of Hibernians in New York have done raises the issues discussed *supra*, as to whether a court, in examining a label placed on an

event by its organizers, is entitled to look behind that label to the underlying facts and circumstances of the event.

Petitioner's arguments seeking the protection of the First Amendment, and their obvious underlying reasons for seeking that protection and the freedom to discriminate, are counter to the very purpose of the First Amendment. "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself *or a private licensee*." *Red Lion*, 395 U.S. at 390 (emphasis added).

The Massachusetts courts' analysis of the facts of the Parade and their legal conclusions based on these facts are well within this Court's standards and practices for First Amendment analysis and jurisprudence described above. The state courts properly determined that the Parade was not speech or expressive association protected by the First Amendment. Petitioners' alleged "message" proffered after their discriminatory conduct was challenged in the courts, was a pretext for private discrimination. This Court has long held that "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." *Norwood v. Harrison*, 413 U.S. 455, 470 (1973). The factual findings and legal conclusions determined by the Massachusetts courts should be carefully examined by this Court, and these *amici* are confident that this Court will agree that there was no error committed.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Judicial Court of Massachusetts should be affirmed.

Respectfully submitted,

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APPENDIX A

CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS

NEW YORK CITY, COMMISSION ON HUMAN RIGHTS, Complainant - against- ANCIENT ORDER OF HIBERNIANS IN AMERICA., INC.; NEW YORK STATE BOARD OF ANCIENT ORDER OF HIBERNIANS; NEW YORK COUNTY, BOARD OF ANCIENT ORDER OF HIBERNIANS; ST. PATRICK'S DAY PARADE AND CELEBRATION, COMMITTEE; and FRANCIS P. BEIRNE, Respondents.	Complaint No. MPA-0362

DECISION AND ORDER

Complainant, New York City Commission on Human Rights ("Complainant"), initiated a complaint alleging that Respondents, Ancient Order of Hibernians in America, Inc.; New York State Board of Ancient Order of Hibernians; New

York County Board of Ancient Order of Hibernians; Saint Patrick's Day Parade and Celebration Committee; and Francis P. Beirne ("Respondents"), unlawfully discriminated against the Intervenor, Irish Lesbian and Gay Organization ("ILGO"), in violation of Sections 8-107(2) and 8-108.1 of the Administrative Code of the City of New York ("Code"), by denying ILGO the privilege of marching in the New York City Saint Patrick's Day Parade ("Parade") on the basis of its members' sexual orientation.

Chief Administrative Law Judge Rosemarie Maldonado of the New York City Commission on Human Rights ("Commission") issued a Recommended Decision and Order ("RDO") finding Respondents in violation of the Code, but denying the relief requested by Complainant on the grounds that granting relief would violate Respondents' First Amendment rights.

DECISION

The Commission's Rules of Practice empower this panel to review the recommended decision and order of the Administrative Law Judge, as well as the evidence in the record of hearing, in determining the appropriate disposition of this complaint. Commission's Rules of Practice, effective March 12, 1975, as amended, Part VII, Rule 36. The panel must determine whether there are sufficient facts in the record to support the Administrative Law Judge's decision, and whether the Administrative Law Judge has correctly applied the law to the facts. Resolution of the Commissioners, November, 1988. Based on our review of the record, and of the arguments of the parties, the Commission hereby adopts the Administrative Law Judge's Findings of Fact and Parts A and B of the Analysis of Evidence and Conclusions of Law of the RDO. As stated, herein we reverse Part C of the Analysis of Evidence and Conclusions of Law of the RDO.

In Part A the Administrative Law Judge found that this Parade is a place of public accommodation. We agree that the New York City Human Rights Law must be read broadly to honor the statue's remedial purposes. RDO at 12. We also agree that, although sponsored by a private organization, the Parade itself is clearly public. This Parade is a large broad-based, widely publicized event, in fact, "one of the largest annual celebrations on the streets of New York City." RDO at 11. It provides 150,000 participants the "'privilege' of celebrating ethnic pride by marching down Fifth Avenue on a business day." RDO at 13. Respondents also "provide the 'service' of organizing the Parade for the benefit and pleasure of all New Yorkers." RDO at 13.

Further, we confirm the Administrative Law Judge's finding in Part B that Respondents discriminated against ILGO in violation of the Code. It is clear that Respondents' decision to exclude ILGO was motivated by the sexual orientation of the organization's members.

As the Administrative Law Judge correctly concluded, finding that the Parade is a place or provider of a public accommodation and the Respondents discriminated against ILGO does not end the analysis. This case raises constitutional questions which can only be answered by balancing the City's interest in enforcing its Human Rights Law against Respondents' First Amendment interest.

After careful review, the panel finds that granting the relief requested by Complainant would not violate Respondents' First Amendment rights. The Administrative Law Judge held that granting the relief requested by Complainant would violate Respondents' First Amendment rights, i.e., free speech, expressive association and free exercise of religion. However, in her analysis the Administrative Law Judge failed to make legal distinction between a statute, regulation or government action which imposes a complete restriction on freedom of expression, associational rights or free exercise, and a generally applicable content-neutral statute or regula-

tion which, in a specific instance, imposes a minimal permissible infringement upon such freedom. Further, we find that the Administrative Law Judge failed to apply the appropriate legal principles based on this distinction.

In order to prevail, Respondents must demonstrate that application of the Human Rights Law's prohibition against discrimination on the basis of sexual orientation to its Parade procedures would unconstitutionally infringe upon Respondents' rights of free speech, expressive association and free exercise as guaranteed by the First Amendment to the United States Constitution and/or by the New York State Constitution, Article 1, Sections 1, 3, 8 and 9. We find that Respondents have failed to make such a showing.

Respondents argue that the Parade is a celebration of Irish Roman Catholic heritage (T. 242-243, 255-256, 358)[1]. They allege that among the unwritten requirements for inclusion in the Parade is that no group admitted have a political agenda or an agenda contrary to the teachings of the Roman Catholic Church (T. 221-222, 284-285, 324, 344-347, 349, 422, 569, 588-591). They argue that ILGO advocates the right to pursue a homosexual lifestyle and is thus in violation of Church doctrine (T. 233-234).

For guidance we turn to the Supreme Court's test established in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), for cases involving expressive association as well as symbolic speech. In that case, the Court held that the right to associate for expressive purposes is not absolute. *Roberts*, 468 U.S. at 623. Infringements on that right may be justified by appropriate regulations that meet the *Roberts* test. *Roberts*, 468 U.S. at 623. That test examines: (1) whether the statute

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1. Numbers in parenthesis preceded by "T" refer to pages in the hearing transcript; those preceded by "Hx" refer to the hearing officer's exhibits; those preceded by "Jx" refer to the joint exhibits; those preceded by "Ix" refer to ILGO's exhibits; those preceded by "Rx" refer to the respondents' joint exhibits.

challenged serves a compelling government interest; (2) whether that interest is unrelated to the suppression of ideas; and (3) whether enforcement of the statute is the least restrictive means of achieving the state's compelling goal. *Roberts*, 468 U.S. at 623.

We disagree with the Administrative Law Judge's analysis that, under the *Roberts* test, the relief requested by Complainant cannot be granted. Rather, we find that under this test the relief requested by Complainant must be granted.

The characteristics of the Parade define the parameters of the First Amendment rights implicated. After examining the record below and reviewing the parties' comments, we find that the St. Patrick's Day Parade is a secular event which is a celebration of a broad range of values surrounding Irish heritage. In her Findings of Fact, the Administrative Law Judge found that the Parade celebrates secular, religious, cultural, historical, civic and numerous other aspects of Irish culture. RDO, Finding of Fact 6-13, at 4-6. Respondents have define the Parade quite broadly and, by their own admission, have allowed a number of diverse groups to participate in their celebration of Irish heritage without regard to those groups' members' race, color, sex or creed. RDO, Findings of Fact 12 and 13, at 6 (*citing* T. 220, 244, 316-3, 18, 496; Jx. B, p. 1), Respondents' associational right is thus the right to associate with persons who support the broad celebratory goals of the Parade rather than, as Respondents argue, the right to associate merely with those who adhere to any one element of Irish heritage, such as Catholicism.

Having defined the associational right, we must now define the nature and weight of the state's interest. As the City's civil rights enforcement agency, the Commission has a compelling interest in enforcing the City's anti-discrimination laws. It is well recognized that a state's enforcement of its own human rights provisions satisfies a compelling government interest. *Roberts*, 468 U.S. at 623; *Gay Rights Coa-*

lition of Georgetown University Law Center v. Georgetown University, 536 A.2d 1, 37 (D.C. App. 1987).

Enforcement of anti-discrimination provisions relating to sexual orientation furthers an important and substantial governmental interest unrelated to the suppression of free expression. *See Roberts*, 468 U.S. at 624; *Georgetown*, 536 A.2d at 32. The New York City Human Rights Law is not, either in its enactment or in its enforcement, specifically directed at Respondents, but applies to all places and providers of public accommodation on a content-neutral basis.

As stated in the RDO, the legislative history of the Code shows that the provision prohibiting discrimination based on sexual orientation was enacted to address the serious problem of prejudice. The City Council found that such prejudice "has fostered a general climate of hostility and distrust, even to the point of physical violence against those perceived to be homosexual." RDO, at 28 (*citing* Local Law 2 of 1986, Section 1). The enforcement of this provision of the Human Rights Law, therefore, serves a compelling purpose in protecting important civil rights of members of the community.

Having defined the parameters of the rights implicated and having established that fighting discrimination is a compelling interest of the City, we can now address the issue of whether or not inclusion of ILGO in the Parade would infringe on Respondents' right to free speech, symbolic or otherwise. The record below and the Findings of Fact reveal that the Parade includes a broad range of persons from all walks of life and of diverse ethnic and religious groups as well as political interests. RDO, Finding of Fact 12, at 6 (*citing* T. 245, 269-270, 275-276, 496). Therefore, we cannot accept the view that the Parade conveys a message which admission of ILGO would dilute or compromise.

We find inconsistencies between the Administrative Law Judge's Findings of Fact and her application of law to

those findings in her legal analysis. For example, Respondents describe the Saint Patrick's Day Parade as a "broad based event," RDO, at 14 (*citing* Jx. A, p. 2), organized to "celebrate the fact that all Americans, native and immigrant alike, enjoy the freedom of the City on the streets of New York." RDO, Finding of Fact 11, at 5 (*citing* Jx. B., p. 1). "Those who march in the Parade are not limited to members of the Respondent organizations or to any religious denomination, race or ethnic group." RDO, Finding of Fact 12, at 6 (*citing* T. 244-245, 496). Therefore, admission of ILGO would not unconstitutionally infringe upon Respondents' rights of free speech and association because ILGO is one of many diverse groups who come together in the Parade to celebrate Irish heritage.

Obviously, the Parade means different things to different people. To some it is a show of homage to the Catholic Church and to the patron saint of Ireland. To others it is a celebration of Irish culture. To still others it is an opportunity to show unity with their Irish-American friends and neighbors. Respondents, themselves, view it as a celebration of freedom in New York City and in the United States. *See* RDO, Finding of Fact 11, at 5. ILGO's inclusion is consistent with these messages. Its members, too, wish to celebrate their Irish heritage alongside their fellow Irish-Americans and friends.

Respondents' argument that ILGO would be excluded for reasons other than the sexual orientation of its members is also without merit. We find nothing in the record to support Respondents' contention that ILGO has an ulterior motive and is attempting to use the Parade to further a political agenda. The Administrative Law Judge observed that ILGO is primarily "social in nature" and "not a political organization." RDO, Findings of Fact 1 and 2, at 3 (*citing* T. 60, 154-155). ILGO's members' objective is simply to celebrate who they are within their community. RDO, Finding of Fact 3, at 3 (*citing* T. 75-76, 157-158). Nor does the record show that

ILGO's members are incapable of adhering to the generally applicable rules of conduct and decorum in the Parade.

For the above reasons, Respondents' contention that the Parade represents symbolic speech of a type or character which would be unconstitutionally altered by the inclusion of ILGO is unpersuasive.

We hold that inclusion of ILGO would not impair Respondents' right of association. The fact that the Parade is sponsored by an Irish-Catholic organization does not change the analysis here. The right of association contemplates not merely the nature of the association, but the message conveyed or the ideas expressed by way of that association. *See Roberts*, 468 U.S. 609. Where, as here, a constitutional interest in the right of freedom to association and speech is implicated, the question is whether the state has a compelling interest, unrelated to the suppression of ideas, that cannot be achieved through less restrictive means. *Roberts*, 468 U.S. at 623 (*citing e.g., Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 91-92 (1982); *Democratic Party of United States v. Wisconsin*, 450 U.S. 107, 124 (1981); *Buckley v. Valeo*, 24 U.S. 1, 25 (1976) (per curiam); *Cousins v. Wogoda*, 419 U.S. 477, 489 (1975); *American Party of Texas v. White*, 415 U.S. 767, 780-781 (1974); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Shelton v. Tucker*, 364 U.S. 479, 486, 488 (1960)). In *Roberts*, the Supreme Court held that the Minnesota Human Rights Law satisfied the State's compelling interest in eliminating discrimination against women. *Roberts*, 468 U.S. at 623. The Court rejected the Jaycees' argument that inclusion of women as voting members would violate their associational rights, finding instead that the Jaycees' message would not be compromised or altered by giving women a voice. *Roberts*, 468 U.S. at 626-627; *see also Board of Dirs. of Rotary Intern. v. Rotary Club*, 481 U.S. 537 (1987). Similarly, inclusion of ILGO, while perhaps repugnant to some participants in the Parade, will not compromise the ideas which the Parade is intended to express.

Cases cited by the Administrative Law Judge relating to the right of expressive association involved situations in which the government's objective was to stop or prevent the expression and/or the association, or in which the effect of the government's actions would have been to eliminate or curtail it. *Gregory v. Chicago*, 394 U.S. 111 (1963) (criminal conviction arising out of peaceful civil rights demonstration reversed because activity was protected by the First Amendment); *Cox v. Louisiana*, 379 U.S. 536 (1965) (same); *Cox v. Louisiana*, 379 U.S. 559 (1965) (same); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (same); *NAACP v. Button*, 371 U.S. 415 (statute imposing certain restrictions on legal profession applied to activities of NAACP held violative of freedom of expression and association); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (statute requiring NAACP to disclose identity of members held an unconstitutional infringement of organizational and individual privacy); *Invisible Empire, KKK v. Mayor et al. of Thurmont*, 700 F. Supp. 281 (D. Md. 1988) (the objective in imposing a nondiscrimination requirement, which the KKK would not accept, was to stop the Klan's parade from occurring. The regulation was adopted specifically to impact on the Klan's planned parade).

We find that the holdings of these cases are not applicable here. Clearly, it is not the intent of this Commission to stop the St. Patrick's Day Parade. Our statutory provision prohibiting discrimination against people because of their sexual orientation was not passed specifically to address the St. Patrick's Day Parade. It was passed in 1986, years before this case arose, and applies to all public accommodations on a content-neutral basis. This case involves the issue of allowing ILGO to march in the Parade. Neither Complainant nor ILGO requests that the City revoke Respondents' parade permit or prohibit Respondents from marching.

Nor is it our intent to unduly interfere with Respondents' individual privacy rights or with Respondents' right to maintain their organization free from government intrusion or

questioning. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449. The Parade is but one event sponsored by Respondents. In fact, the Parade Committee that organizes and runs the Parade is open to persons who are not members of Respondents' organization. RDO, Finding of Fact 13, at 6 (*citing* T. 231-233). The issue in this case is the impact of the Human Rights Law on this event rather than the structure of Respondent's organization.

This decision allows for instances where a parade organizer may seek to exclude persons or groups that have an agenda inconsistent with, or contrary to, those purposes for which the parade is organized or the message which it is intended to convey. Many such events are designed to convey discrete messages, and these are entitled to the protection of the First Amendment. The parade at issue in *Invisible Empire, KKK*, 700 F. Supp. 281, is a prime example. "If ever there was a case where the membership and the message were coextensive, it is here." *Invisible Empire, KKK*, 700 F. Supp. at 289. It is not simply that the KKK parade was limited to card-carrying members of the Klan that distinguishes it from the St. Patrick's Day Parade. Rather, it is the fact that for the Klan, this exclusivity was part and parcel of the message being conveyed. That the exclusivity is part of the message is determinative. In the St. Patrick's Day Parade, no such showing of exclusivity exists.

In general, in like cases involving parades, the degree of exclusivity or diversity will be a factor to be considered. However, the fact that the organizers of a given parade open it to some does not necessarily mean that the state may require them to open it to all who express an interest in participating. Thus, we may envision a scenario, perhaps even in the St. Patrick's Day Parade, where exclusion would be appropriate. This would be determined, however, on a case-by-case basis. Where a parade organizer shows that its First Amendment interests take precedence, it will prevail on the second prong

of the *Roberts* test. Respondents simply have not made this showing here.

The final prong of the *Roberts* test requires examination of whether enforcement of the statute is the least restrictive alternative to satisfy the government's compelling interest. We disagree with the Administrative Law Judge's conclusion that allowing ILGO an alternative opportunity to march provides the organization with an equivalent forum. We are of the view that permitting ILGO the opportunity to march in the Parade is the only means of assuring its members full participation in the life of the community. As ILGO's witnesses compellingly testified, the group's members seek to "celebrate and affirm within their own community that they are lesbians and gay men of Irish descent." RDO, Finding of Fact 3, at 3 (*citing* T. 75-76, 157-158). "To march under an ILGO banner is to simply, with integrity, with honesty and pride, to celebrate who I am, as God has created me. That even means as a person who is Irish, who is gay, and who is Catholic" (T. 180). "We're Irish, and our place is among our people, to express our Irishness" (T. 157). The New York City St. Patrick's Day Parade is the premier Irish American celebration in this city, if not the country. RDO, Findings of Fact 7, 10, and 11, at 4 and 5. No alternative parade would substitute for participation in this Parade. To confine ILGO to a separate parade would be to deny its members full participation in the life of the community and to relegate them to "an undignified position behind the sweepers." *North Shore Right to Life v. Manhasset Am. Legion*, 452 F. Supp. 834, 839 (1978).

The Parade is a meeting of diverse groups — Catholics, non-Catholics, Irish, non-Irish — without regard to sex, race, color or creed to celebrate Irish heritage. Given the Parade's reach beyond the members of the Catholic Church and its inclusion of messages and people not related to Catholicism, it is a sufficiently secular event that inclusion of ILGO in the Parade, as the Parade is presently structured, does not implicate the Respondents' right to free exercise of reli-

gion. Some components of that celebration involve homage to the role of the Catholic Church in Irish history and culture. However, Respondents have created a celebratory vehicle that is sufficiently broad to encompass a wide range of participants, whether they endorse Catholic ideas or not.

Therefore, the Commission finds that Respondents have discrimatd against ILGO in violation of Code Sections 8-107(2) NS 8-108.1.

REMEDY

This Commission is empowered to order legal and equitable relief designed to give force and effect to its order, and effectuate the purposes of the Human Rights Law. Code Section 8-109(2)(c); *e.g., Padilla v. Demetriou*, NYCCHR Compl. No. 135085, Decision and Order (Aug. 31, 1992); *Hageb v. Impeduglia*, NYCCHR Compl. No. H-92-0111, Decision and Order (June 10, 1992). The record establishes that Respondents' criteria for determining whether and when groups are admitted to the Parade are imprecise and "resist simple description." RDO, Findings of Fact 20 and 21, at 8. While Respondents do have a "waiting list," the evidence suggests that they do not strictly adhere to it. Groups have been admitted to the Parade without first being placed on the waiting list or being required to wait until they reached its head (T. 319-320, 324, 468-471). We find that under the circumstances, the appropriate remedy is to order Respondents to offer ILGO admission to the next St. Patrick's Day Parade held in New York City.

ORDER

IT IS HEREBY ORDERED THAT:

1. Respondents cease and desist from engaging in discriminatory practices prohibited by the New York City Human Rights Law.

2. Respondents offer ILGO an opportunity to march in the next St. Patrick's Day Parade subject to the same terms and conditions applied to all Parade participants.

Dated: New York, New York
October 27, 1992

SO ORDERED.
COMMISSION ON
HUMAN RIGHTS

_____
EDWARD MA, Commissioner

_____
EDWARD MAPP, Commissioner

_____
HARILYN ROUSSO, Commissioner